1990

State of Utah v. Bryant Collard : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900246-CA
v.	:	
BRYANT COLLARD,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE (MARIJUANA), A THIRD DEGREE FELONY, UNDER UTAH CODE ANN. § 58-37-8(2)(a)(i) (1990), AND POSSESSION OF MARIJUANA WITHOUT AFFIXING A TAX STAMP UNDER UTAH CODE ANN. § 59-19-106(2) (SUPP. 1990), IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE BOYD L. PARK, JUDGE, PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900246-CA
v.	:	
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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from convictions of possession of a controlled substance (marijuana), a third degree felony, under Utah Code Ann. § 58-37-8(2)(a)(i) (1990), and possession of marijuana without affixing a state tax stamp to it, a third degree felony, under Utah Code Ann. § 59-19-106(2) (Supp. 1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The following issues are presented on appeal:

1. Did the trial court properly deny defendant's motion to suppress evidence seized from defendant's home pursuant to a search warrant?

The factual findings underlying the trial court's ruling on the motion to suppress will not be disturbed on appeal unless they are clearly erroneous. State v. Droneburg, 781 P.2d 1303, 1305 (Utah Ct. App. 1989) (citing State v. Ashe, 745 P.2d

1255, 1258 (Utah 1987)). When a search warrant is challenged as having been issued without an adequate showing of probable cause, the reviewing court does not conduct a de novo review of the magistrate's probable cause determination; instead, the reviewing court determines only whether the magistrate had a substantial basis for concluding that probable cause existed. State v. Babbell, 770 P.2d 987, 991 (Utah 1989). The reviewing court should pay "great deference" to the magistrate's decision. Ibid. See also State v. Stromberg, 783 P.2d 54, 57 (Utah Ct. App. 1989), cert. denied, 139 Utah Adv Rep. 16 (Utah 1990).

2. Was defendant properly convicted and sentenced for both possession of a controlled substance and possession of marijuana without affixing a state tax stamp to it?

Because this issue presents a question of law, this Court applies a "correction of error" standard of review. City of Monticello v. Christensen, 778 P.2d 513, 516 (Utah 1990); Provo City Corp. v. Willden, 768 P.2d 455, 456 (Utah 1989).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional or statutory provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Bryant Collard, was charged with possession of a controlled substance (marijuana), a third degree felony, under Utah Code Ann. § 58-37-8(2)(a)(i) (1990), and possession of marijuana without affixing a state tax stamp to it, under Utah Code Ann. § 59-19-106(2) (Supp. 1990) (R. 8-9).

After a bench trial, defendant was found guilty as charged (R. 60-61). The trial court sentenced defendant to the Utah State Prison for concurrent terms of zero to five years but suspended those sentences and placed him on thirty-six months' probation (R. 61-62).

STATEMENT OF FACTS

The pertinent facts are not in dispute. The following summary of the facts is derived from the affidavit supporting the search warrant, the suppression hearing, and the hearing before the trial court in which defendant was convicted.

On April 29, 1989, Officers Nielsen and Teuscher of the Provo City Police Department, acting on a tip from a confidential informant, intercepted and followed a truck driven by Rex Taylor (SH. 44, 48-49; Affid. paras. 2-15).[1] They had reason to believe that Taylor was transporting and delivering large quantities of marijuana, in violation of the controlled substances laws (Affid. para. 3).

The officers followed Taylor to several locations around the Provo area and observed apparent drug transactions (Affid. paras. 5-15). At approximately 1:10 p.m. that afternoon, they observed Taylor take "a long a [sic] circuitous route" to 130 East 350 North in Orem, defendant's residence (Affid. paras.

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[1] References to "SH." are to the transcript of the suppression hearing. References to "H." are to the transcript of the hearing before the trial court in which defendant was convicted. "Affid. para." refers to paragraphs of the affidavit filed in support of the application for the search warrant under which the evidence was seized from defendant's home. Copies of the affidavit and the search warrant are attached to this brief as Appendix A and Appendix B, respectively.

15-17). At 1:30 p.m., at that address, the officers observed Taylor deliver "to an unknown white male in his 20's wearing a bright green shirt, a bag approximately the size of a grocery bag." The officers then observed the unidentified man enter "one of the houses" (Affid. para. 18). Later that day, after Taylor's arrest and the impoundment of his truck, 12 to 13 pounds of marijuana and $25,000 in cash were discovered in the truck (Affid. para. 22).

Officer Nielsen subsequently prepared and signed an affidavit setting out the foregoing facts which was submitted to a magistrate in support of an application for a search warrant to search defendant's residence (Def. Exh. 1) (Appendix A). Based upon that affidavit, the magistrate issued the requested warrant (Def. Exh. 2) (Appendix B). In a search of defendant's home, the police seized 843 grams of marijuana, none of which bore the appropriate state tax stamp (H. 3-4).

SUMMARY OF ARGUMENT

The trial court correctly concluded that the magistrate had a substantial basis for determining that probable cause existed to support the issuance of a search warrant for defendant's residence.

Alternatively, even if the affidavit in support of the search warrant was technically deficient, the trial court properly denied defendant's motion to suppress because the seized evidence was admissible under the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S. 897 (1984).

Defendant was erroneously convicted and sentenced for both possession of a controlled substance (marijuana) and possession of marijuana without affixing a state tax stamp to it.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIS RESIDENCE PURSUANT TO A SEARCH WARRANT.

Defendant argues that the trial court erred in denying his motion to suppress the evidence seized from his residence pursuant to a search warrant because that warrant was issued on the basis of an affidavit that did not establish probable cause that his residence contained contraband.[2] Specifically, he claims the affidavit failed to identify his residence as the place which contained the contraband the affiant officer suspected Rex Taylor delivered to the "unknown white male" at 130 East 350 North, Orem, Utah. Defendant does not contend that the affidavit did not establish probable cause to believe that Taylor was transporting and delivering contraband.

A. Sufficiency of the Affidavit

In denying the motion to suppress, the trial court stated:

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[2] Defendant's argument is based solely on the fourth amendment; he does not analyze the suppression issue under article I, section 14 of the Utah Constitution. Therefore, the State will not address the question of whether the analysis would be different under the state constitution. See State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988) ("As a general rule, we will not engage in a state constitutional analysis unless an argument for different analyses under the state and federal constitutions are briefed.").

The affidavit gives detailed information about a man named Rex Taylor who was suspected of delivering marijuana for future distribution. An informant provided a tip about Taylor. This tip was verified by police observation. The affidavit describes a circuitous route with frequent stops and brief interactions with several individuals. At the end of this route the police arrested Taylor who had in his truck large quantities of marijuana and cash. All of these facts support a finding that Taylor was in the act of distributing marijuana. The defendant was one of the individuals who had a brief exchange with Taylor. The affidavit states Taylor arrived at 130 East 350 North, Orem, Utah[,] where Bryant Collard resides. It then describes how Taylor "handed to an unknown white male in his 20's wearing a bright green shirt, a bag approximately the size of a plastic grocery bag. The unknown white male then turned and walked into one of the houses." The affidavit does not describe the defendant or his home in any more detail.

[] However, the search warrant does describe the house in detail including the house number on the mailbox attached to the house. Whether the search warrant description is adequate depends upon the facts of each case, and the description is adequate if the officer with reasonable effort can identify the place. State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985). The search warrant description in this case should be sufficient for determining which house is to be searched.

[] The discrepency [sic] between the supporting affidavit and the search warrant indicates that the house description probably was mistakenly omited [sic] from the affidavit. Omitted information must be inserted, when an affidavit is evaluated to determine probable cause. State v. Nielsen, 727 P.2d 188, 191 (Utah 1986). Also the magistrate has discretion to define an ambiguous term. State v. Babbell, 770 P.2d 987, 992 (Utah 1989). The court's duty is simply to ensure that the magistrate had a substantial basis for concluding probable cause existed. Illinois [v. Gates, 103 S. Ct.] at 2332. If the house discription [sic] had been included in the affidavit all the

> facts and circumstances provided show there was a fair probability contraband would be in the house described. State v. Hansen, 732 P.2d 127, 130 (Utah 1987).

Ruling at 2-3 (R. 39-40) (a copy of the trial court's ruling, in its entirety, is attached to this brief as Appendix C). Although the trial court's reading of State v. Nielsen is suspect, its ultimate conclusion that the magistrate had a substantial basis for determining that probable cause existed was correct.

In State v. Babbell, 770 P.2d 987 (Utah 1989), the Utah Supreme Court summarized the standards upon which a challenge to a search warrant is reviewed:

> The first question is whether the search warrant was supported by probable cause. The fourth amendment requires that when a search warrant is issued on the basis of an affidavit, that affidavit must contain specific facts sufficient to support a determination by a neutral and detached magistrate that probable cause exists. State v. Nielsen, 727 P.2d 188, 190 (Utah 1986), cert. denied, 480 U.S. 930, 107 S.Ct. 1565, 94 L.Ed.2d 758 (1987). The affiant must articulate particularized facts and circumstances leading to a conclusion that probable cause exists. Mere conclusory statements will not suffice. Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76 L.Ed.2d 1453 (1983). The magistrate's task is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her] . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238, 103 S.Ct. at 2332; see State v. Espinoza, 723 P.2d 420, 421 (Utah 1986).
>
> When a search warrant is challenged as having been issued without an adequate showing of probable cause, the fourth amendment does not require that the reviewing court conduct a de novo review of the magistrate's probable cause determination; instead, it requires only that the reviewing

> court conclude "that the magistrate had a substantial basis for . . . [determining] that probable cause existed." Illinois v. Gates, 462 U.S. at 238-39, 103 S.Ct. at 2332 (quoting Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)); see State v. Romero, 660 P.2d 715, 719 (Utah 1983); see generally 1 LaFave, Search and Seizure § 3.1(c) (2d ed. 1987) . . . . The reviewing court, in conducting that examination, should consider a search warrant affidavit "in its entirety and in a common-sense fashion." State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985); see also State v. Hansen, 732 P.2d 127, 129-30 (Utah 1987)(per curiam)(applying this standard of review). Finally, the reviewing court should pay "great deference" to the magistrate's decision. Gates, 462 U.S. at 236, 103 S.Ct. at 2331 (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)).

770 P.2d at 990-91. See also State v. Stromberg, 783 P.2d 54, 56-57 (Utah Ct. App. 1989), cert. denied, 139 Utah Adv. Rep. 16 (Utah 1990); State v. Droneburg, 781 P.2d 1303, 1304-05 (Utah Ct. App. 1989). The trial court correctly applied these standards in concluding that the magistrate had a substantial basis for determining that probable cause existed to support the issuance of a search warrant for defendant's residence.

Defendant correctly observes that paragraphs 16 through 18 of the affidavit prepared and sworn to by Officer Nielsen are the only paragraphs that specifically refer to defendant's residence. They read, in context:

> 15. At about 1:05 p.m. a maroon colored mini pick-up truck met with Taylor in front of Five Star Auto. Taylor left approximately five minutes later northbound on 1200 West.
>
> 16. Taylor via a long a [sic] circuitous route arrived at 130 East 350 North in Orem.

> 17. At 130 East 350 North, Orem, Utah, resides Bryant Collard. Collard has convictions for DUI and theft.
>
> 18. At 1:30 p.m. on April 29, 1989, I watched as Rex Taylor handed to an unknown white male in his 20's wearing a bright green shirt, a bag approximately the size of a plastic grocery bag. The unknown white male then turned and walked into one of the houses.
>
> 19. Taylor then left and drove to his mother's home located at 3460 North 475 East.
> . . .

Affidavit at 2 (Appendix B). In assessing the information contained in paragraphs 16-18, the trial court noted that the search warrant described defendant's residence in detail and the affidavit did not. Ruling at 3. It concluded, however, that "[t]he discrepency [sic] between the supporting affidavit and the search warrant indicates that the house discription [sic] probably was mistakenly omited [sic] from the affidavit." Ibid. Relying on State v. Nielsen, 727 P.2d 188, 191 (Utah 1986), cert. denied, 480 U.S. 930 (1987), for the proposition that "[o]mitted information must be inserted, when an affidavit is evaluated to determine probable cause," and on State v. Babbell, 770 P.2d at 992, for the proposition that "the magistrate has discretion to define an ambiguous term," Ruling at 3, the court then concluded:

> If the house discription [sic] had been included in the affidavit all the facts and circumstances provided show there was a fair probability contraband would be in the house described.

Ruling at 3 (citations omitted).

As previously noted, defendant's primary challenge to the affidavit is that it failed to particularly describe the

house which the "unknown white male" entered after he received the bag from Taylor. Indeed, paragraph 18 states merely that the unknown white male "turned and walked into one of the houses" (emphasis added). The trial court sought to remedy this deficiency by inserting a more detailed description of the house into which the suspect walked by reference to the description of defendant's home that appears in the search warrant. However, this procedure is flawed in two respects.

First, the trial court misinterpreted State v. Nielsen as allowing insertion into the affidavit of omitted information to render the affidavit sufficient to establish probable cause. In Nielsen, the supreme court, in the context of deciding whether there had been an invalid search under Franks v. Delaware, 438 U.S. 154 (1978), stated:

> In Franks, the United States Supreme Court held that a defendant is entitled to an evidentiary hearing to challenge the validity of a search warrant if the defendant can establish that (i) an affiant in an affidavit supporting a search warrant made a false statement intentionally, knowingly, or with a reckless disregard for the truth, and (ii) the affidavit is insufficient to support a finding of probable cause after the misstatement is set aside. By an extension of reasoning, the same test applies when a misstatement occurs because information is omitted; the affidavit must be evaluated to determine if it will support a finding of probable cause when the omitted information is inserted.

727 P.2d at 191 (citations omitted). Clearly, the supreme court's allowance for insertion of information into an affidavit was specifically tied to a false statement in the affidavit, something that was not present in the instant case. Therefore,

the trial court's reliance on Nielsen was misplaced, and its insertion of information to bolster the affidavit with additional information was improper.[3]

Second, a more detailed description of defendant's house, without any information that the unidentified white male entered that house, does little to cure the ambiguity inherent in paragraph 18's statement that the suspect entered "one of the houses."

On the other hand, the trial court's reliance on State v. Babbell for the proposition that the magistrate had the discretion to define an ambiguous term in the affidavit (i.e., paragraph 18's reference to "one of the houses") was entirely justified. In Babbell, where the sufficiency of the affidavit supporting a search warrant was challenged, the affidavit "set out specifically and in detail the characteristics of the [defendant's] truck as described by the witnesses [who observed the defendant shortly before he sexually assaulted one of their friends]." 770 P.2d at 992. "It then explain[ed] that Cazier [the affiant], a trained officer, had observed the truck from the street and then more closely with the resident's permission and

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[3] There was no evidence before the trial court that the magistrate had information, beyond that which appeared in the affidavit, on what house the unidentified white male entered after receiving the suspected contraband from Taylor. Officer Nielsen, who swore to the affidavit, did not testify as to what additional information, if any, he gave the magistrate prior to the issuance of the warrant (SH. 14-22). And, Officer Teuscher, who assisted in the preparation of both the affidavit sworn to by Officer Nielsen and the search warrant signed by the magistrate, acknowledged that he was neither present when Nielsen presented those documents to the magistrate nor aware of any additional information that Nielsen may have provided the magistrate at that time (SH. 44-45, 53-54).

state[d] that defendant's vehicle 'matches' the given description." Ibid. On these facts the supreme court concluded:

> We acknowledge that the affidavit is ambiguous in its use of the word "match," but conclude that it was within the magistrate's discretion to construe Cazier's statement that Babbell's truck "matched the description" to mean that the truck matched with respect to those chartacteristics expressly described in the affidavit. Once that reasonable construction was made, the magistrate had a "substantial basis" for determining that there was a "fair probability" that a search would uncover evidence. Gates, 462 U.S. at 238-39, 103 S.Ct. at 2332. The described characteristics of the truck are sufficiently specific to permit the magistrate to decide whether the truck in the driveway was distinctive enough to give him probable cause to believe that it was the truck used in the crime and that a search would produce evidence.

770 P.2d at 992 (footnote omitted).[4] Whether the affidavit in the instant case was sufficient to establish probable cause to search defendant's house is, as was a similar issue in Babbell, a

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[4] In the footnote omitted from this quote the court said:

> Although we conclude that the magistrate did not err in finding the affidavit sufficient, we must observe that this is a very close question. If the affidavit were more vague, we might well reach the opposite conclusion. Judges should be reluctant to base a probable cause determination on so poorly drafted an affidavit. The better approach would be to require that an affiant take the simple step of clearly and unambiguously stating how the vehicle matches the detailed description obtained from witnesses. A few short minutes spent in more carefully preparing this affidavit would have ensured the protection of the accused's constitutional rights while saving a substantial amount of time for the courts and the parties.

770 P.2d at 992 n.3.

very close question. However, the magistrate, reading paragraphs 15 through 19 of the affidavit together, could have reasonably construed paragraph 18 to mean that the unidentified white male, after receiving the bag from Taylor, had entered the house at the precise address where the suspected drug delivery had just occurred, which was specifically identified in paragraphs 16 and 17 as 130 East 350 North, Orem, Utah, defendant's residence.

While the affidavit surely could have been more artfully drafted, see Babbell, 770 P.2d at 992 n.3, a reviewing court must consider an affidavit "in its entirety and in a common-sense fashion," Babbell, 770 P.2d at 991 (quoting State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985)), and recognize that "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation [and that] [t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.'" Illinois v. Gates, 462 U.S. 233, 235 (1983) (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)). As also stated in Gates:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of the affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." Spinelli, supra, at 419. "A grudging or negative attitude by reviewing courts toward warrants," Ventresca, 380 U.S., at 108, is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense manner." Id., at 109.
>
> . . . .

> We also have said that "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," United States v. Ventresca, 380 U.S. 102, 109 (1985). This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

462 U.S. at 236, 237 n.10.

In sum, although admittedly a very close question, the trial court, according the magistrate the high degree of deference required by United States Supreme Court case law, properly concluded that the magistrate had a substantial basis for determining that there was probable cause to search defendant's house. Even though this is a marginal case, it "'should be . . . determined by the preference to be accorded to warrants.'" Gates, 462 U.S. at 237 n.10 (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)). Cf. State v. Droneburg, 781 P.2d at 1305 (where the supporting affidavit, which contained nothing more than conclusory statements of the affiant officer, was so obviously insufficient that the State conceded there was not a substantial basis upon which the magistrate could determine the existence of probable cause).

B. Good Faith Exception to the Exclusionary Rule

Even if this Court were to conclude that the affidavit was inadequate to provide the magistrate with a substantial basis for determining that probable cause existed, the evidence seized

pursuant to the invalid warrant would nevertheless be admissible under the good faith exception to the exclusionary rule enunciated in United States v. Leon, 468 U.S. 897 (1984).

In Mapp v. Ohio, 367 U.S. 643 (1961), the United States Supreme Court held that federal constitutional guarantees against unlawful search and seizure required exclusion of illegally obtained evidence in state criminal trials. However, in Leon the Court carved out a "good faith" exception to that exclusionary rule, "hold[ing] that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case in chief of federal and state criminal prosecutions." Leon, 468 U.S. at 927 (Blackmun, J., concurring). The Court said:

> We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," Illinois v. Gates, 462 U.S., at 267 (WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." United States v. Ross, 456 U.S. 798, 823, n.32 (1982). Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, cf. Harlow v. Fitzgerald, 457 U.S. 800, 815-819 (1982), and it is clear that in some

> circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.
>
> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Brown v. Illinois, 422 U.S., at 610-611 (POWELL, J., concurring in part); see Illinois v. Gates, supra, at 263-264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid. Cf. Massachusetts v. Sheppard, post, at 988-991.

468 U.S. at 922-23 (footnotes omitted).

The Leon good faith exception applies directly to this case. If the Officer Nielsen's supporting affidavit was technically insufficient because it failed to indicate more precisely that the unidentified white male entered defendant's house, it was not so inadequate that the officers could not have acted in objectively reasonable reliance on the warrant that was issued by a neutral and detached magistrate. This is not a case where the issuing magistrate was misled by knowingly or

recklessly false information in an affidavit, or where the magistrate wholly abandoned his role as a neutral and detached judicial officer, or where the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at 922-23. Cf. State v. Droneburg, 781 P.2d at 1305 (where the supporting affidavit was "so lacking in indicia of probable cause" that the State conceded "it was unreasonable for the officer who prepared the affidavit to rely on a warrant issued on the strength of it"). Quite to the contrary, this is a case where the officers prepared a very detailed affidavit which, in hindsight, could and should have more precisely identified defendant's house as the house into which a suspected recipient of contraband had entered. However, that defect in the affidavit is not so obvious that the officers had "no reasonable grounds for believing that the warrant was properly issued." Leon, 468 U.S. at 923. In short, the officers' reliance on the warrant issued was objectively reasonable, and the deterrent purpose of the federal exclusionary rule would not be served by excluding the challenged evidence under the circumstances of this case.[5]

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[5] Although in the trial court the State did not argue the Leon good faith exception as an alternative ground for admission of the challenged evidence, it is settled law that an appellate court may affirm on any proper ground. State v. Bryan, 709 P.2d 257, 260 (Utah 1985) ("[T]his Court may affirm the trial court's decision on any proper grounds, even though the trial court assigned another reason for its ruling.").

POINT II

DEFENDANT WAS ERRONEOUSLY CONVICTED OF BOTH POSSESSION OF A CONTROLLED SUBSTANCE AND POSSESSION OF MARIJUANA WITHOUT AFFIXING A STATE TAX STAMP TO IT, AS THOSE OFFENSES ARE INCLUDED OFFENSES UNDER UTAH CODE ANN. § 76-1-402(3) (1990).

Defendant argues that possession of a controlled substance (marijuana), as defined in Utah Code Ann. § 58-37-8(2)(a)(i) (1990), and possession of marijuana without affixing a state tax stamp to it, as defined in Utah Code Ann. § 59-19-106(2) (Supp. 1990), are included offenses under Utah Code Ann. § 76-1-402(3) (1990), and thus he could not properly be convicted and sentenced for both offenses. The State agrees.

Section 76-1-402(3) provides in pertinent part:

> (3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
>
> > (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]

The analysis for determining whether offenses are included under section 76-1-402(3)(a) is set forth in State v. Hill, 674 P.2d 96 (Utah 1983). As stated in State v. Branch, 743 P.2d 1187, 1191 (Utah 1987), cert. denied, 485 U.S. 1036 (1988), the Hill test has two components:

> The principal test [for whether offenses are included] involves a comparison of the statutory elements of each crime. Subsection 76-1-402(3)(a) provides the definition of lesser included offenses that is applied for this purpose: an offense is lesser included when "[i]t is established by proof of the same or less than all the facts required to

> establish the commission of the offense charged. . . ." Thus, where the two crimes are "such that the greater cannot be committed without necessarily having committed the lesser," then as a matter of law they stand in the relationship of greater and lesser offenses, and the defenant cannot be convicted or punished for both.
>
> . . . .
>
> The secondary test is required by the circumstance that some crimes have multiple variations, so that a greater-lesser relationship exists between some variations of these crimes, but not between others. A theoretical comparison of the statutory elements of two crimes having multiple variations will be insufficient. In order to determine whether a defendant can be convicted and punished for two different crimes committed in connection with a single criminal episode, the court must consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial.

743 P.2d at 1191 (quoting State v. Hill, 674 P.2d at 97) (citations omitted).

Section 58-37-8(2)(a)(i) provides that it is unlawful:

> for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection[.]

Section 59-19-106(2) states:

> In addition to the tax penalty imposed, a dealer distributing or possessing marihuana or controlled substances without affixing the appropriate stamps, labels, or other indicia is guilty of a third degree felony.

The variation of section 59-19-106(2) proved at trial was possession of marijuana without affixing a state tax stamp to it.

Proof of this variation necessarily established the offense of possession of a controlled substance (marijuana) defined in section 58-37-8(2)(a)(i). Therefore, the two offenses are included offenses under the Hill test, and defendant could not properly be convicted and punished for both.[6]

Accordingly, the Court should vacate defendant's conviction and sentence for possession of marijuana without affixing a state tax stamp to it, leaving intact the conviction and sentence for possession of a controlled substance.[7]

CONCLUSION

Based on the foregoing arguments, this Court should affirm defendant's conviction and sentence for possession of a controlled substance and vacate his conviction and sentence for possession of marijuana without affixing a state tax stamp to it.

---

[6] Had defendant been charged with possession of a controlled substance with intent to distribute under Utah Code Ann. § 58-37-8(1)(a)(iv) (1990), there would be no included offense problem. This is so because each offense would have required proof of an element the other did not--i.e., section 59-19-106(2) requires proof of the absence of a state tax stamp in addition to possession, and section 58-37-8(1)(a)(iv) requires proof of intent to distribute in addition to possession. See State v. Cross, 649 P.2d 72, 73 (Utah 1982).

[7] Both of defendant's convictions were for third degree felonies. He does not indicate in his brief which conviction he wants the Court to set aside. Because the code provides for enhanced punishment for a subsequent conviction of marijuana possession, see Utah Code Ann. § 58-37-8(2)(d) (1990), the State requests that defendant's conviction of possession under section 58-37-8(2)(a)(i) be the conviction affirmed.

RESPECTFULLY submitted this 18th day of September, 1990.

R. PAUL VAN DAM
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Shelden R. Carter, Attorney for Appellant, 3325 N. University Avenue, Suite 200, Jamestown Square, Clocktower Bldg., Provo, Utah 84604, this 18th day of September, 1990.

David B. Thompson

APPENDICIES

APPENDIX A

Copy Aff.

IN THE FOURTH CIRCUIT COURT, STATE OF UTAH

COUNTY OF UTAH, PROVO DEPARTMENT

AFFIDAVIT IN SUPPORT OF AND APPLICATION FOR

SEARCH WARRANT

STATE OF UTAH)
: ss
COUNTY OF UTAH)

I, Tom Nielsen, being first duly sworn on oath, depose and say:

1. That your affiant is a police officer for the City of Provo, currently assigned to the Special Investigative Services Bureau in the Narcotics Division.

2. That officers of the Provo Police Department, acting upon information received from several confidential informants and verified by surveillance intercepted and followed a truck belonging to Rex Taylor.

3. The information received was that subject Taylor would be transporting and delivering controlled substances, marijuana. (See affidavit in support of and application for search warrant executed by Officer Kim Collins on April 29, 1989 before the Honorable Lynn W. Davis of the Fourth Circuit Court, a copy of which is attached hereto and included herein as if set forth in full.)

4. Acting on the information your affiant went to S.D.S. Auto at 825 West Center, Provo, Utah, looking for Taylor's truck which is described as a black 1969 General Motors pick-up truck with a black camper shell pulling a boat trailer.

5. At 12:15 p.m. on April 29, 1989, I found the truck and Rex Taylor on the lot at S.D.S. Auto. With Taylor was Bruce Draper, identified in the affidavit attached hereto, and his vehicle, which is a 1984 Chevrolet Blazer, model K10, Utah plate 524BSA, and a vehicle that I recognized belonging to Scott Fazzio, known to be a co-owner of S.D.S. Auto.

6. Rex Taylor's vehicle was parked on the east end of the lot and was joined at the same spot by the above two vehicles and occupants. They met and had conversation for approximately five minutes, during which time an unknown white male left with a brown paper bag about the size approximately six inches wide and two inches thick and twelve inches long. Then all three vehicles left S.D.S. Auto.

7. Fazzio's car left eastbound on Center Street. Rex Taylor and Bruce Draper drove westbound on Center Street in their separate vehicles arriving at a small grocery store in the 1900 block of West Center.

8. Taylor and Draper parked their vehicles in a grocery store lot next to each other. They both left their vehicles and moved about their vehicles for approximately five minutes.

9. Taylor and Draper then left the grocery store lot driving north on Geneva Road. Bruce Draper drove to his home at 1964 West 500 North. Taylor continued north on Geneva Road into Orem.

10. At approximately 12:45 p.m. on April 29, 1989, Taylor arrived at a Protestant Church located approximately 300 South 1200 West, Orem, Utah.

11. There Taylor met an unknown white male driving a yellow Ford pick-up truck who appeared to be waiting for Taylor. Taylor and the unknown male conversed for about five minutes before driving south on 1200 West in Orem.

12. Taylor and the unknown male in separate vehicles arrived at Five Star Auto located at 600 South 1200 West, Orem, Utah, and conversed for another five to ten minutes, while moving about their vehicles on foot.

13. At approximately 1:00 p.m. on April 29, 1989, the yellow pick-up truck left Five Star Auto northbound on 1200 West.

14. At the same time Taylor was conversing with the male in the yellow pick-up at least two unknown white males exited Five Star Auto and met with Taylor and the male.

15. At about 1:05 p.m. a maroon colored mini pick-up truck met with Taylor in front of Five Star Auto. Taylor left approximately five minutes later northbound on 1200 West.

16. Taylor via a long a circuitous route arrived at 130 East 350 North in Orem.

17. At 130 East 350 North, Orem, Utah, resides Bryant Collard. Collard has convictions for DUI and theft.

18. At 1:30 p.m. on April 29, 1989, I watched as Rex Taylor handed to an unknown white male in his 20's wearing a bright green shirt, a bag approximately the size of a plastic grocery bag. The unknown white male then turned and walked into one of the houses.

19. Taylor then left and drove to his mother's home located at 3460 North 475 East. There Taylor made several trips between his truck and his mother's house.

20. At approximately 2:00 p.m. an unknown white male arrived and spoke with Rex near the rear door of the camper shell. At one point Rex opened the camper shell door allowing the unknown male to look in.

21. Shortly thereafter your affiant along with other officers from the Provo Police Department and Utah County Sheriff's Office arrived and took Rex Taylor and the other unknown individual into custody. In plain view in the cab of the pick-up truck was a brown bag similar to the one delivered to the male at S.D.S. Auto and a large quantity of twenty dollar bills. In plain view through the window in the door of the camper shell was a brown plastic trash bag containing clear plastic zip-lock bags containing a green leafy substance.

22. The truck was impounded and inventoried and approximately 12 to 13 pounds of marijuana was located in the back. The brown bag in the cab also contained marijuana. Also found in the truck was in excess of $25,000 cash.

23. Rex Taylor owns a home located at 4574 North Windsor Drive, Provo, Utah, a short distance from the location where Rex Taylor was arrested on April 29, 1989, as described above. The residence is further described as a larger home with brown brick in the center, the north and south sides framed in cream with brown wood. There is a deck facing the front, from the south side to the north side. The residence is on the east side of Windsor Drive. It has steps leading to the front door. The home is on a steep incline. The home bears the number 4574 on the south portion and the front portion by the curb. On the north side of the building above the garage is a large room.

SEE PHOTOS, 2 EXHIBITS SET FORTH IN ORIGINAL COPY.

AFFIANT

Subscribed and sworn to before me this 29 day of April, 1989.

CIRCUIT JUDGE

24.

ON APR 29TH 1985 WHEN R. TAYLOR WAS ARRESTED ALSO PRESENT WAS CRAIG SWAN. UPON BEING QUESTIONED SWAN INDICATED THAT HE PERFORMED LABOR AND REPAIRS FOR TAYLOR AT HIS RESIDENCE AT 4574 N. WINSOR. HE INDICATED THAT HE HAD RECEIVED MARIJUANA AS PAYMENT FOR WORK. HE STATED THAT HE HAD COME FROM THE HOME TO MEET TAYLOR JUST PRIOR TO THE ARREST. SWAN INDICATED THAT ON PRIOR OCCASIONS HE HAS RECEIVED PAYMENT, IN THE FORM OF MARIJUANA, AT TAYLOR'S RESIDENCE AT 4574 N. WINSOR.

25. LEDGERS, BOOKS, AND OTHER PAPERS WERE FOUND IN TAYLOR'S TRUCK SHOWING DRUG DEALINGS WITHIN UTAH COUNTY AND OTHER AREAS.

R

IN THE FOURTH CIRCUIT COURT, STATE OF UTAH

COUNTY OF UTAH, PROVO DEPARTMENT

AFFIDAVIT IN SUPPORT OF AND APPLICATION FOR SEARCH WARRANT

STATE OF UTAH)
: ss
COUNTY OF UTAH)

I, Kim Collins, being first duly sworn on oath, depose and say:

1. That your affiant is a police officer for the City of Provo, currently assigned to the Special Investigative Services Bureau in the Narcotics Division.

1a. Your affiant has knowledge in the use and sale of narcotics, i.e. marijuana, cocaine, crystal methamphetamine. Your affiant has received training from the Provo City Police Department, Las Vegas Metropolitan Police Department, and the Department of Justice, State of California. In November of 1988 your affiant attended a forty-hour class on the identification and detection of the aforementioned drugs. Your affiant also has knowledge that individuals involved in the illegal use and sale of narcotics frequently deal in large quantities of cash, and that said cash is normally broken down into envelopes marked with the amount to be delivered to each individual, and that marijuana is normally packaged in ziplock container bags, as well as crystal methamphetamine and cocaine, and that scales and other measuring devices are normally present at defendant's residence.

1b. I have developed contacts and have spoken with users, manufactuers and traffickers of controlled substances, along with informants and experts in the area of controlled substances regarding the manufacture and trafficking of controlled substances in the Utah County area. I have negotiated for and purchased controlled substances while acting in an undercover capacity.

2. On April 29, 1989 at 0830 hours affiant received a telephone call from confidential informant informing me that a delivery of 20 to 50 pounds of marijuana is to be made at 1964 West 500 North, known as Leisure Village Trailer Park, Provo City, Utah. The defendant delivering the marijuana is a Rex P. Taylor, date of birth August 5, 1954, and the delivery is to be made to Jeff Draper, living at above address.

recovery and seizing of one pound of marijuana. The marijuana was described as being concealed underneath a waterbed, which is the same place your affiant recovered the illegal substance.

A. On February 28, 1989 confidential informant provided information on the following individuals as dealing in narcotics.

a. Douglas Snow, date of birth August 14, 1956, has a criminal history dating to 1976, including alcohol and drug arrests. Snow also resides at 1964 West 500 North, Provo, Utah. Snow is an associate of Bruce Draper, and also has a telephone listed in his name at said address, phone number 373-6744.

b. Rex P. Taylor, date of birth August 5, 1954, has a criminal history beginning in 1973 for alcohol and drug arrests with convictions of possession of controlled substance. Taylor is believed to be living in Las Vegas, Nevada and makes frequent trips to the Provo area every two weeks.

c. Jack Wilkinson AKA Jackie Wilkinson, date of birth January 6, 1966, has arrests for alcohol, narcotics, and burglary beginning from 1973 to present.

d. Bruce Draper, date of birth January 20, 1955, has arrests for alcohol and drug involvement for the past ten years, including arrests for possession of controlled substances.

4. Confidential Informant has further provided the following information that Jack Wilkinson receives marijuana from Bruce Draper, who, in turn, purchases his marijuana from Rex P. Taylor.

5. In January of 1989 officers from Provo City Police Department and Utah County Sheriff's Department conducted surveillances at the residence of Bruce Draper in which vehicles belonging to Rex Taylor, Douglas Snow, Jack Wilkinson were all seen parked at the residence of Draper.

6. Your affiant has received further information from an independent source, a David J. Mecham, date of birth September 3, 1963. Your affiant interviewed Mecham on March 23, 1989, wherein Mecham identified the following individuals dealing in narcotic

R3

7. Your affiant believes that a delivery of marijuana and crystal methamphetamine will be delivered to said address by Rex Taylor on this date.

8. Your affiant has probable cause to believe that narcotic trafficking is currently being conducted at 1964 West 500 North, Provo, Utah in a mobile home located in Leisure Village Trailer Park, and that large amounts of crystal methamphetamine, marijuana are being distributed from this location.

9. Based upon my training and experience I believe that a search of the property at 1964 West 500 North, Provo City, Utah will result in the seizure of narcotics; i.e. cocaine, crystal methamphetamine and marijuana, and your affiant further requests that based upon the aforementioned information and investigation, a search warrant be issued for items in violation of section 58-37-8.

Tim Collins
AFFIANT

Subscribed and sworn to before me this 29 day of April, 1989.

CIRCUIT JUDGE

APPENDIX B

IN THE FOURTH CIRCUIT COURT, STATE UTAH

COUNTY OF UTAH, PROVO DEPARTMENT

SEARCH WARRANT

STATE OF UTAH)
:
COUNTY OF UTAH)

THE STATE OF UTAH to: Tom Nielsen, Provo Police Department, or any other peace officer in the State of Utah in assistance:

Proof of affidavit having been made before me this 29th day of April, 1989, by Tom Nielsen of Provo City, Utah County, State of Utah, that he has probable cause to believe that evidence involved in the use and sale of narcotics is currently located at 130 East 350 North, Orem, Utah. Residence is further described as being a red brick house with an aluminum screen door and has a bright red asphalt shingle roof. There is a pine tree near the center of the front lawn and a small white mail box attached to the front of the house next to the screen door with the numbers 130 on it. A car port is on hte east side of the house, a black wrought iron hand rail on the front steps and adjacent sidewalk leading to the front steps. There is a dark stone planter box on the east side of the driveway.

Your affiant also requests permission to search all rooms, attics, safes, garage, out-buildings, whether attached or unattached, surrounding grounds, storage areas, trash receptacles, vehicle(s) and any and all other containers, including but not limited to as follows:

1. Evidence of conspiracy including books, ledgers, accounts payable and receivable, Buy-owe sheets, contracts, letters, memoranda of agreement between conspirators, formulas, receipts, telephone records, phone books, address books, and other personal property tending to establish a conspiracy.

2. U.S. Currency

3. Financial records of persons in control of the premises, tax returns, bank accounts, loan application, income and expense records, safe deposit box keys, and records, property, acquisitions, and notes.

control of said premises and/or vehicle(s), including rent receipts, telephone bills, utility bills, telephone/address books, cancelled mail, vehicle registration, keys and photographs.

5. Rifles, handguns, shotguns, along with any ammunition for same.

6. Methamphetamine, amphetamine, and ingredients used in the production of methamphetamine, marijuana, cocaine both rock and powder, and any other illegal narcotics.

7. Scales

8. Record of drug transactions.

9.

Upon reading said information supported by said affidavit, the court is of the opinion and, therefore, finds there is probable cause to believe that the facts stated in said affidavit are true, and that evidence pertaining to the above-mentioned case may be contained in the described location.

The items to be seized are evidence of violations of Sections 58-37-8.

This is a no-knock search warrant to prevent the delay or discovery or destruction of narcotics at said location.

NOW, THEREFORE, YOU AND EACH OF YOU are hereby commanded to make a thorough search of the above-described residence and vehicle and hereto seize all evidence pertaining to the investigation as described by said affidavit, and to make returns promptly to this court of your doings under this writ.

You are further directed to bring said evidence forthwith at the above Fourth circuit Court, Provo Utah, County of Utah, or to hold same in your possession pending further notice of this court.

Dated this 29th day of April, 1989.

Time 9:55 p.m.

JUDGE

THIS WARRANT MAY BE EXECUTED ANY TIME DURING THE DAY OR NIGHT.
THIS WARRANT MUST BE SERVED WITHIN TEN DAYS OF ITS ISSUANCE.

APPENDIX C

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

******

THE STATE OF UTAH,

Plaintiff,

vs.

BRYANT COLLARD,

Defendant.

CASE NUMBER CR 89 364

RULING

BOYD L. PARK, JUDGE

******

This matter came regularly before the court on the Defendant's Motion to Suppress. Deputy Utah County Attorney James R. Taylor represented the State of Utah, and Shelden Carter Esq. represented the defendant. The court having read the Motion makes the following Findings and Ruling.

FINDINGS

1. The police came to Mr. Collard's home about 10:00 p.m. with a search warrant to search for drugs and contraband. The police were expecting to find marijuana. To avoid disrupting his family Mr. Collard assisted the police in finding a pound of marijuana in the basement. Defendant now claims that the search warrant was not valid, because the supporting affidavit did not show sufficient probable cause, and any consent for the search was coerced.

2. A search warrant must be supported by an affidavit providing a nutral magistrate with substantial basis for determining probable cause, which is based on a totality-of-the-circumstances analysis. Illinois v. Gates, 462 U.S. 237, 238-9, 103 S.Ct. 2317, 2332 (1983) The defendant contends that the search warrant was not valid because the affidavit supporting the warrant does not show sufficient probable cause. Specifically the defendant says the affidavit does not adequately describe the house and the suspect involved.

3. The affidavit gives detailed information about a man named Rex Taylor who was suspected of delivering marijuana for further distribution. An informant provided the police with a tip about Taylor. This tip was verified by police observation. The affidavit describes a circuitous route with frequent stops and brief interactions with several individuals. At the end of this route the police arrested Taylor who had in his truck large quantities of marijuana and cash. All of these facts support a finding that Taylor was in the act of distributing marijuana. The defendant was one of the individuals who had a brief exchange with Taylor. The affidavit states Taylor arrived at 130 East 350 North, Orem, Utah; where Bryant Collard resides. It then describes how Taylor "handed to an unknown white male in his 20's wearing a bright green shirt, a bag approximately the size of a plastic

grocery bag. The unknown white male then turned and walked into one of the houses." The affidavit does not describe the defendant or his home in any more detail.

4. However, the search warrant does describe the house in detail including the house number on the mailbox attached to the house. Whether the search warrant description is adequate depends upon the facts of each case, and the description is adequate if the officer with reasonbale effort can identify the place. State v. Anderson, 701 P.2d 1099, 1102 (Utah 1985). The search warrant description in this case should be sufficient for determining which house is to be searched.

5. The discrepency between the supporting affidavit and the search warrant indicates that the house description probably was mistakenly omited from the affidavit. Omitted information must be inserted, when an affidavit is evaluated to determine probable cause. State v. Nielsen, 727 P.2d 188, 191 (Utah 1986). Also the magistrate has discretion to define an ambigious term. State v. Babbell, 770 P.2d 987, 992 (Utah 1989). The court's duty is simply to ensure that the magistrate had a substantial basis for concluding probable cause existed. Illinois at 2332. If the house discription had been included in the affidavit all the facts and circumstances provided show there was a fair probability contraband would be in the house described. State v. Hansen, 732 P.2d 127, 130 (Utah 1987).

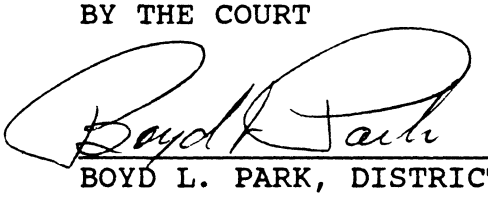
6. Because great deference is given to the magistrate's determination of probable cause, and sufficient facts were present in this case to support the magistrate's finding of probable cause, the search warrant issued is valid. Any further issue of whether there was consent to search does not need to be addressed.

RULING

Defendant's Motion to Supress is denied.

Dated this 11th day of December, 1989.

BY THE COURT



BOYD L. PARK, DISTRICT JUDGE

cc: Deputy Utah County Attorney James R. Taylor
Sheldon R. Carter, Esq.